Re Fong Yuan Kwong, ex p Public Bank Bhd

HIGH COURT (TERMERLOH) — BANKRUPTCY NO 29-321-1993
LOW HOP BING J
18 OCTOBER 1995

Bankruptcy *— Creditor's petition — Appeal against striking out — Whether amount due from debtor in creditor's petition must include further judgment interest — Whether must give exact value of security held — Extent to which an 'estimate' of value of security is acceptable — Whether creditor's petition in compliance with s 5(2) of the Bankruptcy Act 1967 — Failure of registrar to consider proceeds of auction and accrual of judgment interest — Bankruptcy Act 1967 s 5(2)*

Bankruptcy *— Creditor's petition — Appeal against striking out — Whether balance of debt due after taking into account judgment interest and proceeds of auction sale was above RM10,000 — Failure of registrar to consider proceeds of auction and accrual of judgment interest — Bankruptcy Act 1967 s 5(1)(a)*

Bankruptcy *— Creditor's petition — Dispute on amount due from judgment debtor in creditor's petition — Time at which dispute over amount of judgment debt can be raised — Whether judgment debtor can raise issue of payments made which were not accounted for at creditor's petition stage*

Bankruptcy *— Adjudication and receiving orders — Whether court can issue orders on reduced figures at time of hearing of creditor's petition — Receiving order may be made as long as judgment debt remains above statutory limit of RM10,000 — Bankruptcy Act 1967 s 5(1)(a)*

In this bankruptcy case, the judgment creditor had issued a creditor's petition against the judgment debtor. The judgment debtor filed a notice objecting to the creditor's petition. At the hearing of the creditor's petition, the creditor's petition was struck off by the senior assistant registrar on the grounds that the estimated value of the secured property was more than the amount claimed in the creditor's petition and that the petitioning creditor had failed to show the amount owing after deduction of the estimated value of the secured property. The judgment creditor appealed against the decision of the senior assistant registrar dated 14 June 1995. The parties narrowed down the issues to the following:

(a) Where at the time of the issue of the creditor's petition, the security held was estimated to be more than the amount stated in the creditor's petition, is the creditor's petition in compliance with s 5 of the Bankruptcy Act 1967 ('the Act')?

(b) What is the effect when the proceeds from an auction are received subsequent to the issue of the creditor's petition which consequently reduces the figure stated in the creditor's petition?

(c) Where a conflict arises in the respective affidavits of the judgment debtor and the judgment creditor pertaining to the judgment creditor's accounting of the payments made by the judgment

A debtor, how is that conflict resolved?

(d) Can the court issue a receiving order and adjudication order based on reduced figures?

Held, allowing the petitioning creditor's appeal:

B (1) The act of bankruptcy here was completed on 13 April 1994, that is, when the senior assistant registrar dismissed the judgment debtor's application to set aside the bankruptcy notice. As the judgment debtor's first affidavit was dismissed, it could not operate as an application to set aside the bankruptcy notice within the contemplation of s 3(1)(i) of the Act and the case C should be treated as if no affidavit had been filed (see pp 49I and 50A–B; *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 3 CLJ 324 and *Soh Bok Yew v Cindee Developments Sdn Bhd* [1977] 1 MLJ 242 followed).

(2) The debt stated in the creditor's petition issued on 20 June 1994 D was that stated in the bankruptcy notice issued 18 months previously. However, further judgment interest for the period 1 December 1992 (the day after the issue of the bankruptcy notice) to 7 March 1994 (the day prior to the auction of the secured property) satisfied the requirements in s 5(1)(b) of the Act and should be taken into consideration at the time of the E hearing of the creditor's petition. Therefore, at the time the bankruptcy petition was presented, all the conditions prescribed in s 5(1) were satisfied (see p 50B–G).

(3) Section 5(2) of the Act requires the petitioning creditor as a secured creditor to state his willingness to give up the security or F give an estimate of the value of the security held. The word 'estimate' in s 5(2) of the Act means an approximate judgment of a value and not an exact precise value. Therefore, the estimated value of the security at RM255,000 was an approximate sum as the actual auction sum was RM227,698.75. The senior assistant G registrar had erred in not considering the actual proceeds from the auction received by the petitioning creditor and the accrual of further judgment interest. If the same had been duly considered, the creditor's petition would be in compliance with s 5(2) of the Act (see p 51A–G; *Re Rabindera Singh, ex p Malaysian International Merchant Bankers Bhd* [1989] 2 CLJ 858 followed).

H (4) Taking into account the actual net proceeds received from the auction of the secured property (RM224,184) and the accrual of further judgment interest to be included in the judgment debt (RM43,548), the debt due as at 7 March 1994 was RM32,959 and at 31 May 1994 was RM39,744. Thus while the proceeds of I the auction which were received after the issue of the creditor's petition reduced the figure stated in the petition, the balance of the debt due was still clearly above the statutory limit of RM10,000 prescribed in s 5(1)(a) of the Act. On these facts, the creditor's petition should not have been struck off (see p 52C–E).

(5) Any dispute or discrepancies in the amount actually due from the judgment debtor to the petitioning creditor ought to have been raised at the bankruptcy notice stage, within the time frame and in the manner and on grounds stipulated in the bankruptcy notice. The judgment debtor is, at the creditor's petition stage, precluded from raising the issue that payments made by the judgment debtor have not been accounted for (see pp 52I and 53A–B).

(6) Even where the judgment debt on which the creditor's petition was founded had by the date of the hearing of the petition been substantially reduced, the court could still make a receiving order unless the judgment debt was below the statutory minimum. Here, the debt was RM39,744, ie above the statutory limit. The petitioning creditor had disclosed material facts relating to the judgment debt, ie that security held had been auctioned and the proceeds received (see p 53C–D; *Re Loh Kok Huah, ex p Ban Hin Lee Bank Bhd* [1992] 1 MLJ 687 followed).

[Bahasa Malaysia summary

Di dalam kes kebankrapan ini, si piutang penghakiman telah mengisukan petisyen si piutang kepada penghutang penghakiman. Penghutang penghakiman pula memfailkan notis bantahan terhadap petisyen si piutang. Di pembicaraan petisyen si piutang, petisyen si piutang itu telah dibatalkan oleh penolong kanan pendaftar atas alasan-alasan bahawa nilai yang dianggarkan untuk harta yang dicagarkan itu adalah lebih daripada jumlah tuntutan di dalam petisyen si piutang dan bahawa si piutang mempetisyen itu telah gagal menunjukkan jumlah yang masih terhutang selepas ditolak nilai anggaran harta yang dicagar itu. Si piutang penghakiman merayu terhadap keputusan penolong kanan pendaftar bertarikh 14 Jun 1995. Pihak-pihak dalam kes ini menghadkan isu-isu kepada yang berikut:

(a) Di mana pada masa petisyen si piutang diisu, nilai anggaran harta yang dicagar itu adalah lebih daripada jumlah yang dinyatakan di dalam petisyen si piutang, adakah petisyen si piutang tersebut dibuat mengikut s 5 Akta Kebankrapan 1967 ('Akta itu')?

(b) Apakah kesannya sekiranya hasil jualan daripada lelongan itu diterima selepas petisyen si piutang diisukan yang membawa kesan mengurangkan jumlah yang dinyatakan di dalam petisyen si piutang?

(c) Di mana timbul konflik di dalam afidavit-afidavit penghutang penghakiman dan si piutang penghakiman masing-masing berkenaan tentang akaun si piutang penghakiman yang disimpan oleh bayaran-bayaran hutang yang dibuat oleh penghutang penghakiman, bagaimanakah konflik ini diselesaikan?

(d) Bolehkan mahkamah mengeluarkan perintah penerimaan dan perintah penghukuman berdasarkan jumlah yang telah dikurangkan?

A **Diputuskan**, membenarkan rayuan si piutang mempetisyen:

(1) Perbuatan kebankrapan telah selesai di sini pada 13 April 1994, iaitu, apabila penolong kanan pendaftar menolak permohonan penghutang penghakiman untuk mengetepikan notis kebankrapan. Oleh kerana afidavit pertama penghutang penghakiman ditolak, ia tidak boleh bertindak sebagai permohonan untuk mengetepikan notis kebankrapan mengikut s 3(1)(i) Akta itu dan kes itu patut diperlakukan seperti tiada afidavit yang telah difailkan (lihat ms 49I dan 50A–B; *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 3 CLJ 324 dan *Soh Bok Yew v Cindee Developments Sdn Bhd* [1977] 1 MLJ 242 diikut).

(2) Hutang yang dinyatakan di dalam petisyen si piutang yang diisu pada 20 Jun 1994 adalah jumlah yang dinyatakan di dalam notis kebankrapan yang diisu 18 bulan sebelumnya. Walau bagaimanapun, bunga selanjutnya ke atas hutang penghakiman untuk tempoh masa dari 1 Disember 1992 (hari selepas notis kebankrapan diisu) hingga 7 Mac 1994 (hari sebelum lelongan harta bercagar itu) memuaskan keperluan dalam s 5(1)(b) Akta itu dan patut dipertimbangkan pada masa pembicaraan petisyen si piutang. Maka, pada masa petisyen kebankrapan dikemukakan, semua syarat yang disebut di dalam s 5(1) telah dipuaskan (lihat ms 50B–G).

(3) Seksyen 5(2) Akta itu memerlukan si piutang mempetisyen, sebagai si piutang bercagar, menyatakan kesanggupannya untuk melepaskan cagarannya atau memberi anggaran nilai cagaran yang dipegang itu. Perkataan 'anggaran' dalam s 5(2) tersebut bermaksud jangkaan nilai yang lebih kurang dan bukannya satu nilai yang tepat. Maka, nilai anggaran cagaran itu sebanyak RM255,000 adalah satu jumlah yang lebih kurang sahaja kerana jumlah yang diterima daripada lelongan itu hanyalah RM227,698.75. Penolong kanan pendaftar telah tersilap kerana tidak mengambil kira jumlah hasil jualan yang sebenarnya diterima daripada lelongan tersebut oleh si piutang mempetisyen serta bunga selanjutnya ke atas hutang penghakiman. Jika faktor-faktor ini dipertimbangkan, petisyen si piutang itu akan mematuhi s 5(2) Akta itu (lihat ms 51A–G; *Re Rabindera Singh, ex p Malaysian International Merchant Bankers Bhd* [1989] 2 CLJ 858 diikut).

(4) Mengambil kira hasil bersih yang sebenarnya diterima daripada lelongan harta bercagar itu (RM224,184) dan keakruan bunga selanjutnya ke atas hutang penghakiman yang akan dimasukkan ke dalam hutang penghakiman (RM43,548), hutang yang kena dibayar pada 7 Mac 1994 adalah RM32,959 dan pada 31 Mei 1994 adalah RM39,744. Oleh itu sedangkan hasil lelongan itu yang diterima selepas petisyen si piutang diisu mengurangkan jumlah yang dinyatakan di dalam petisyen itu, baki hutang yang dibayar masih melebihi had statutori RM10,000 seperti yang diperuntukkan dalam s 5(1)(a) Akta itu. Di atas fakta ini, petisyen

si piutang tidak sepatutnya dibatalkan (lihat ms 11A–C dan 12A).

(5) Apa-apa pertikaian dan pencanggahan mengenai jumlah yang patut dibayar oleh penghutang penghakiman kepada si piutang mempetisyen itu patut ditimbulkan pada peringkat notis kebangkrapan, dalam tempoh masa dan mengikut cara yang ditetapkan dan atas alasan-alasan yang diperincikan di dalam notis kebangkrapan tersebut. Pada peringkat petisyen si piutang ini, penghutang penghakiman dihalang daripada menimbulkan isu bahawa bayaran-bayaran yang telah dibuat oleh penghutang penghakiman telah tidak diambilkira di dalam pengiraan hutang (lihat ms 52I dan 53A–B).

(6) Biarpun dalam keadaan di mana hutang penghakiman yang mengasaskan petisyen si piutang sebahagian besarnya telah dikurangkan menjelang tarikh pembicaraan petisyen, mahkamah masih boleh membuat perintah penerimaan melainkan hutang penghakiman berada di bawah had statutori minima. Di sini, hutang adalah RM39,744, iaitu di atas had statutori. Si piutang mempetisyen telah memberikan fakta material berkaitan dengan hutang penghakiman, iaitu bahawa cagaran yang dipegang telah dilelong dan hasil jualan telah diterima (lihat ms 53C–D; *Re Loh Kok Huah, ex p Ban Hin Lee Bank Bhd* [1992] 1 MLJ 687 diikut).]

Notes

For cases on creditor's petition, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1297–1302.

For cases on adjudication orders, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1264–1275.

For cases on receiving orders, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1612–1626.

Cases referred to

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 3 CLJ 324

Loh Kok Huah, ex p Ban Hin Lee Bank Bhd, Re [1992] 1 MLJ 687

Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan [1993] 2 MLJ 423

Rabindera Singh, ex p Malaysian International Merchant Bankers Bhd, Re [1989] 2 CLJ 858

Soh Bok Yew v Cindee Developments Sdn Bhd [1977] 1 MLJ 242

Legislation referred to

Bankruptcy Act 1967 ss 2, 3(1)(i), 5(1)(a), (b), (2)

Bankruptcy Rules 1969 r 95, Form 7

Morgan Mariappan (Ong Kok Bin & Co) for the judgment creditor.

Richard Bong (Bong & Co) for the judgment debtor.

Low Hop Bing J:

I APPEAL

This is an appeal from the decision of the learned senior assistant registrar dated 14 June 1995 striking out the creditor's petition.

II FACTS AND CHRONOLOGY OF EVENTS

Public Bank Bhd (the plaintiff in the Kuala Lumpur High Court (Commercial Division) Suit No D2–23–1138–87 ('the Kuala Lumpur suit')) had at the request of Messrs Fong Yuan Kwong and Wong Juan Ten @ Pong Sing Poh (second and third defendants therein respectively) granted Wah Hing Realty & Development Sdn Bhd (first defendant therein) general banking facilities by way of an overdraft. The second and third defendants had executed a letter of guarantee to guarantee and indemnify the plaintiff in respect of all principal sums due and owing by the first defendant to the extent of RM140,000 with interest due thereon. In addition to the letter of guarantee, the general banking facilities were secured by way of a charge over a three-storey shophouse belonging to the second and third defendants ('the secured property'). Sometime in 1986/1987, the first defendant failed to maintain their accounts following which a suit was brought against all the three defendants. The other events leading to this appeal may be noted as follows:

Date	Events
23.6.1987	Public Bank Bhd ('the judgment creditor') obtained judgment in default of appearance against all the three defendants. The judgment against the second defendant, the judgment debtor in the present bankruptcy case ('the judgment debtor'), was for a guarantee sum of RM140,000 together with interest at the rate of 14.75% per annum with monthly rests with effect from 1st March 1987 to the date of full realization and costs of RM255.
2.8.1991	First auction of the secured property, but unsuccessful.
28.3.1992	Second auction of secured property, but aborted.
30.11.1992	Judgment creditor issued bankruptcy notice ('the bankruptcy notice').
16.1.1993	The bankruptcy notice was served, by way of personal service, on the judgment debtor.
22.1.1993	Judgment debtor filed an affidavit to set aside the bankruptcy notice ('the first affidavit').
19.5.1993	Third auction of the secured property, also unsuccessful.
9.9.1993	Judgment creditor filed an affidavit-in-reply.
24.9.1994	Judgment debtor applied to set aside the judgment in default and for stay of all proceedings.
8.3.1994	Secured property was successfully auctioned for RM255,000.

17.3.1994 Judgment debtor filed a second affidavit for the purpose of setting aside the bankruptcy notice ('the second affidavit'). A

13.4.1994 Judgment debtor's application to set aside the bankruptcy notice was dismissed by the learned senior assistant registrar, Temerloh on the grounds that: B

(1) the first affidavit of the judgment debtor failed to follow, both in form and substance, Form 7 of the Bankruptcy Rules 1969 ('the Rules'), which must contain the requirements of s 3(1)(i) of the Bankruptcy Act 1967 ('the Act') in that the affidavit must state that he has a counterclaim, set-off or cross-demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in which the order was obtained; and C D

(2) the second affidavit of the judgment debtor was filed out of time, some 14 months after the date of service of the bankruptcy notice. E

4.5.1994 Judgment debtor's application to set aside the judgment in default of appearance was dismissed with costs.

20.6.1994 Judgment creditor issued a creditor's petition.

10.8.1994 Net proceeds from the auction of the secured property, amounting to RM227,698.75 was received by the petitioning creditor from the court. F

24.12.1994 Creditor's petition was served by way of personal service on the judgment debtor.

14.2.1995 Judgment debtor filed a notice objecting to the creditor's petition. G

22.2.1995 Hearing of the creditor's petition, but postponed to 14 June 1995.

29.5.1995 Petitioning creditor filed an affidavit-in-reply to judgment debtor's notice objecting to the creditor's petition. H

14.6.1995 Creditor's petition was struck off by the learned senior assistant registrar on the grounds that the estimated value of the secured property was more than the amount claimed in the creditor's petition and that the petitioning creditor had failed to show the amount owing after deduction of the estimated value of the secured property. I

III ISSUES FOR DETERMINATION IN THIS APPEAL

The parties herein have narrowed down the issues to the following:

(1) Where, at the time of the issue of the creditor's petition, the security held, according to the estimate, was more than the amount stated in the creditor's petition, is the creditor's petition in compliance with s 5 of the Act?

(2) What is the effect when the proceeds from an auction are received subsequent to the issue of the creditor's petition which consequently reduces the figure stated in the creditor's petition?

(3) Where a conflict arises in the respective affidavits of the judgment debtor and the judgment creditor pertaining to the judgment creditor's accounting of the payments made by the judgment debtor, how is that conflict resolved?

(4) Can the court issue the receiving order and adjudication order based on reduced figures?

IV DECISION OF THE COURT IN THIS APPEAL

(1) *Where, at the time of the issue of the creditor's petition, the security held, according to the estimate, was more than the amount stated in the creditor's petition, is the creditor's petition in compliance with s 5 of the Act?*

Section 5 of the Act prescribes the conditions on which a creditor may present a bankruptcy petition against a debtor. More specifically, s 5(1) provides negatively that:

> A creditor shall not be entitled to present a bankruptcy petition against a debtor unless —
>
> (a) the debt owing by the debtor to the petitioning creditor ... amounts to ten thousand ringgit; and
>
> (b) the debt is a liquidated sum payable either immediately or at some certain future time; and
>
> (c) the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition;and
>
> (d) the debtor is domiciled in Malaysia ...

Wan Suleiman FJ in *Soh Bok Yew v Cindee Developments Sdn Bhd* [1977] 1 MLJ 242 at p 243G held, inter alia, that:

> ... the act of bankruptcy was completed the very moment the court dismissed the application to set aside the notice.

Hence, on 13 April 1994, when the learned senior assistant registrar dismissed the judgment debtor's application to set aside the bankruptcy notice, the act of bankruptcy was completed. The judgment debtor's first affidavit having been dismissed 'cannot operate as an application to set aside the bankruptcy notice within the contemplation of s 3(1)(i) of the Act and the case should be treated as if no affidavit under r 95 of the Rules

had in fact been filed'. See *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 3 CLJ 324, per Mohamed Dzaiddin SCJ at p 328a. A

Similarly, the judgment debtor's second affidavit was also dismissed, being filed out of time, ie some 14 months after the date of service of the bankruptcy notice, contrary to the 7-day rule provided in s 3(1)(i) of the Act for the service effected in Malaysia. B

Following the act of bankruptcy being completed on 13 April 1994, the judgment creditor on 20 June 1994 issued a creditor's petition for RM213,861.45. The amount of debt due as stated in the said creditor's petition followed that stated in the bankruptcy notice which was issued more than 18 months prior to the issue of the creditor's petition. The aforesaid debt did not include further judgment interest at the rate of 14.74% per annum with monthly rest which, however, continued to accrue and would become due and payable to the judgment creditor. C

The accrual of further judgment interest for the period 1 December 1992 (the day after the date of issue of the bankruptcy notice) to 7 March 1994 (the day prior to the successful fourth auction of the secured property) was computed and deposed by the petitioning creditor to amount to RM43,548.04. D

This aforesaid further judgment interest satisfies the requirement in s 5(1)(b) of the Act as: E

> ... a claim for interest will be treated ... as liquidated demand, since its amount can be duly calculated as mere matter of arithmetic ...

(See 1 *White Book 1991* at para 13/1/14.) Further, 'a liquidated demand is in the nature of debt, ie a specific sum of money due and payable under or by virtue of a contract. Its amount must be either be already ascertained or capable of being ascertained as a mere matter of arithmetic.' (See 1 *White Book 1991* at para 6/2/4.) F

In my judgment, this further judgment interest should be taken into consideration at the time of the hearing of a creditor's petition and cannot be disregarded, more particularly so when this further judgment interest amounts to RM10,000 or more. G

In the circumstances, I am of the considered view that at the time the bankruptcy petition was presented, all the conditions prescribed in s 5(1) have been duly satisfied.

It is now necessary for me to consider the implications of s 5(2) of the Act which reads: H

> If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of the security.

The petitioning creditor herein is a secured creditor within s 2 of the Act being 'a person holding a ..., charge .... on the property of the debtor or any part thereof as a security for a debt due to him from the debtor ...'. I

(See also the judgment of Mohd Azmi SCJ in *Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan* [1993] 2 MLJ 423.)

Section 5(2) of the Act requires the petitioning creditor as a secured creditor to state his willingness to give up the security or give an estimate of the value of the security held. This 'willingness to give up the security or give (an estimate of) the value of the security is supplied by the debtor himself.' (See *Re Rabindera Singh, ex p Malaysian International Merchant Bankers Bhd* [1989] 2 CLJ 858 at p 859F.)

The petitioning creditor herein elected to give an estimate of the value of the security and accordingly estimated the value to be RM255,000, the value secured in the successful fourth auction conducted on the 8 March 1994. This estimated value of the security is stated in para 3 of the creditor's petition.

In my judgment, the word 'estimate' in s 5(2) of the Act means an approximate judgment of a value and not an exact, precise value. The petitioning creditor elected to quote the auction amount of RM255,000 as an estimated value of the security as it was believed to be the best possible estimate of the value at the time of issue of the creditor's petition on the 20 June 1994. As deposed by the judgment debtor in his affidavit, the actual auction sum received by the petitioning creditor on 10 August 1994, some seven weeks after the creditor's petition was issued, was only RM227,698.75. From the affidavit deposed by the petitioning creditor, the amount after deducting expenses was RM224,194.75. Hence, the estimated value at RM255,000 was an approximate sum.

Section 5(2) further states that where the petitioning creditor elects to give an estimate of the value of his security 'he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as petitioning creditor in the same manner as if he were an unsecured creditor'.

In my judgment, the learned senior assistant registrar had erred by not taking into consideration the actual proceeds from the auction received by the petitioning creditor and the accrual of further judgment interest, details of which were deposed in the petitioning creditor's affidavit-in-reply. Where the same had been duly considered, the creditor's petition would be in complicance with s 5(2) of the Act.

(2) *What is the effect when the proceeds from the auction are received subsequent to the issue of the creditor's petition which consequently reduces the figure stated in the creditor's petition?*

The creditor's petition was issued on the 20 June 1994 following the act of bankruptcy being committed by the judgment debtor. The net proceeds from the successful fourth auction of 8 March 1994 was received by the petitioning creditor on the 10 August 1994, some seven weeks after the issue of the creditor's petition. The creditor's petition was issued some 2½ months after the auction of the secured property and some 1½ months after the judgment debtor's application to set aside the judgment in default of appearance was dismissed.

Hence, when the creditor's petition, based on a valid bankruptcy notice was filed on the 20 June 1994, the petitioning creditor had not been paid the sum of RM227,698.75. Mohamed Dzaiddin J (as he then was) in *Re Loh Kok Huah, ex p Ban Hin Lee Bank Bhd* [1992] 1 MLJ 687 at pp 687H and 690H said:

> ... since the sale proceeds were paid to the petitioner after the filing of the creditor's petition, the amount claimed in the bankruptcy notice remained as the amount actually due from the debtor to the petitioner at the time the creditor's petition was filed.

Further, due consideration should be given to:

(a) the actual net proceeds received from the auction of the secured property, which in this matter was only RM224,194.75; and

(b) the accrual of further judgment interest of RM43,548.04 which should be included with the judgment debt amount stated in the creditor's petition.

The final amount, taking into consideration these two facts, was that the debt due from the judgment debtor amounted to RM32,959.74 as at 7 March 1994 and RM39,744.66 as at 31 May 1994 which is clearly above the statutory limit of RM10,000 stated in s 5(1)(a) of the Act. On these facts, the creditor's petition should not have been struck off by the learned senior assistant registrar as the balance of debt due after taking in account the further accrued judgment interest and the proceeds of the auction sale is still above the amount of RM10,000 stipulated in the Act.

(3) *Where a conflict arises in the respective affidavits of the judgment debtor and the judgment creditor pertaining to the judgment creditor's accounting of payments made by the judgment debtor, how is that conflict resolved?*

During the period between the date of obtaining the judgment in default dated 23 June 1987 and the date of the issue of the bankruptcy notice on 30 November 1992, the judgment debtor had forwarded various payments to the petitioning creditor which were received on a without prejudice basis. Following the issuance and service of the creditor's petition on the 20 June 1994 and 24 December 1994 respectively, the judgment debtor on 14 February 1995, filed a notice supported by the judgment debtor's affidavit sworn on 14 February 1995 ('the third affidavit') objecting to the creditor's petition. In the third affidavit, the judgment debtor alleges in para 9 that various payments were not taken into account by the petitioning creditor, allegations which were substantially the same as those raised in the second affidavit to set aside the bankruptcy notice.

The judgment debtor's allegations were duly replied by the petitioning creditor vide the affidavit of Mr Chang Kat Kiam sworn on 29 May 1995 wherein it is stated that all payments after taking into consideration dishonoured cheques and wrong entries have been duly accounted for in the bankruptcy notice and the creditor's petition.

Any dispute or discrepancies in the amount actually due from the judgment debtor to the petitioning creditor ought to have been raised at

A the bankruptcy notice stage, within the time frame and in the manner and on grounds stipulated in the bankruptcy notice. The judgment debtor's affidavit to set aside the bankruptcy notice was dismissed by the learned senior assistant registrar on 13 April 1994 for want of compliance with the requirements of s 3(1)(i) of the Act and Form 7 of the Rules. The B judgment debtor is now, at the creditor's petition stage, precluded from raising the issue that payments made by the judgment debtor have not been accounted for.

(4) *Can the court issue the receiving order and adjudication order based on reduced figures?*

C In this appeal, the judgment debt due at the time of the hearing of the creditor's petition, taking into account the further accrued judgment interest and the net proceeds from the auction sale of the security, stood at RM39,744.65 which, as stated above, is clearly above the statutory limit of RM10,000 provided in s 5(1)(a) of the Act.

D Mohamed Dzaiddin J (as he then was) in *Re Loh Kok Huah, ex p Ban Hin Lee Bank Bhd* [1992] 1 MLJ 687 at p 687I, held that 'even where the judgment debt on which the creditor's petition was founded had by the date of hearing of the petition been substantially reduced, the court could still make a receiving order unless the judgment debt was less than the statutory minimum'.

E It was submitted for the judgment debtor that the petitioning creditor has failed to disclose material facts, viz, that the security held had been successfully auctioned and that the proceeds from the auction had been received. Upon a proper perusal of the creditor's petition, I note that the petitioning creditor has in fact disclosed in para 3 of the creditor's petition F that they do hold security for the payment of the debt and that they estimate the value of such security at RM255,000.

In conclusion, on the facts of this case and the foregoing grounds, I am of the view that the creditor's petition should not have been struck off by the learned senior assistant registrar. I, therefore, allow the petitioning G creditor's appeal and hereby set aside the decision of the learned senior assistant registrar, with costs.

Appeal allowed.

Reported by Nik Firdaus bte Nik Hussain

H

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